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No. ___

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

VOLUNTEERS OF AMERICA—
MINNESOTA-BAR NONE BOYS RANCH,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Act grants the National Labor Relations Board jurisdiction over the Volunteers of America Bar None Boys Ranch for emotionally disturbed children when that organization is engaged in the primary religious activities of an established church.

2. Whether the exercise of jurisdiction over the Volunteers of America Bar None Boys Ranch violates the Religion Clauses of the First Amendment.

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Volunteers of America—Minnesota-Bar None Boys Ranch petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS DELIVERED BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 752 F.2d 345 (1985) and is printed in its entirety in the Appendix attached hereto at pages App. 1-8. The opinion of the National Labor Relations Board is reported at 269 NLRB No. 176 (1984) and printed in its entirety in the Appendix attached hereto at pages App. 9-16.

JURISDICTION

The judgment of the Court of Appeals (App. at 1-8) was entered January 15, 1985. A petition for rehearing is not required by the Court of Appeals prior to petitioning for a Writ of Certiorari. Committee Comment, Rule 15 of the Rules of the United States Court of Appeals for the Eighth Circuit. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The parties who have an interest in this Petition are the National Labor Relations Board and the Teamster's Local No. 638.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

U. S. Constitutional Amendment I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Statutes

29 U.S.C. § 152(2). "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

STATEMENT OF THE CASE

Facts Material to an Understanding of the Issues

The Bar None Boys Ranch ("the Ranch") is a religious residential treatment center for children which is operated by the Volunteers of America—Minnesota ("VOA-MN"), an unincorporated association which operates under the direction of the National Society of the Volunteers of America ("VOA"). (T-16, 47).[1] The VOA is a religious movement which started in New York City in 1896. (T-15). The VOA's purpose was and is to reach and uplift all segments of the population and to bring to persons in need the knowledge of God. The Church prospered and spread across the country with numerous "posts" being established. The Minnesota Post was established in 1896. (T-16).

Both the Minnesota Post and the National Society are recognized and established religious orders. (T-17). The Internal Revenue Service and the United States Department of Commerce recognize that the VOA is a church. (T-40). The Church is exempt under Section 501(c)(3) of the Internal Revenue Code and all contributions to the VOA are tax deductible. The State of Minnesota also has granted the VOA an exemption as a non-profit religious organization. (T-17, 19).

The Minnesota Post of the VOA is part of the VOA's mid-western region and is under the direction of Reverend Jack L. Dignum. All of the officers of the National Society of the

[1] An administrative hearing on the issue of jurisdiction of the National Labor Relations Board ("the Board" or "the NLRB") over the VOA-MN took place on August 19, 1983 before Hearing Officer Frank Kapsch, in Minneapolis, Minnesota, at the Regional Offices of the Board. Case 18-RC-13483. References to the transcript of those proceedings will be in the form of "T-" followed by the page number(s) on which the cited testimony can be found.

Volunteers of America either are ordained or licensed ministers. (T-21). In Minnesota, there are 45 ministers, including Reverend Dignum, working for the VOA. (T-16). VOA ministers operate every post in the United States and administer their programs according to the religious tenets of the VOA. Reverend James Hogie operates the Minnesota Post.

The unique character of the VOA and its various posts was explained by the United States Treasury Department when it ruled on the VOA's tax status:

> ... The primary purpose of The Volunteers of America is to conduct evangelistic, religious, missionary services and that all other activities in which this organization may engage are secondary to that primary purpose and are but a means to the end of bringing those who you serve to the immediate knowledge and active service of God.

The VOA and its posts do not attempt to persuade persons to believe in any particular "brand" of religion; rather, persons are encouraged to return to the active service of God according to their own religious beliefs. Moreover, unlike more traditional Christian denominations with which the public may be more familiar, proselytizing and preaching are not the manner in which the VOA seeks to attain its religious goals. Its express historical and present mission is to provide service to those members of society most in need. The VOA believes that service to the needy is grounded in, and ordered by, the Holy Scriptures.

For the VOA, social service programs are *not* a "secular activity" of the Church. Daily service to humanity is the very essence of the VOA's existence. The basic tenet of the Church is that people who are helped will come to find God through the good work and counseling received in the VOA programs. Because the VOA and its posts do not maintain churches in the traditional sense and do not conduct religious "services" in the traditional sense, the social services provided to those in need

are the religious activities of the Church. Thus, while a Catholic, Methodist or Lutheran Church may provide social services as an auxiliary function, the so-called "social services" that are the subject of this litigation are the primary religious activities of the VOA. The provision of service to the needy is as sacred to the VOA as is communion for the Catholic and Protestant religions.

The VOA's religious philosophy is contained in the Manual of the National Society of the Volunteers of America. Article I of the VOA's Constitution is found in the Manual. It stresses that the VOA "is a movement organized for the reaching and up-lifting of all sections of the people and bringing them to the immediate knowledge and active service of God." Because the VOA believes that the physical as well as the spiritual needs of the needy must be met to bring a person to the active service of God, the VOA's primary religious activities are directed at the "whole" person. People who are helped by the VOA will come to find God through the good work and counseling received in VOA programs and through the example set by the life and work of VOA members. Indeed, many, if not most, of those who become ministers in the VOA, are employees who became interested in the Church as a result of providing social services to the needy. In turn, many of these employees were recipients of the VOA's services. Thus, employees are viewed as the primary source for future converts, but these employees must first serve with the Church for one year.

The Ranch, as are all VOA programs, is operated in strict accordance with the Church's religious philosophy. The religious principles of the VOA underlie the decisions of the Ranch's management and the actions of the employees.

The Ranch is a religious residential treatment center for children who are handicapped due to emotional problems, behavioral problems, autism, neurological problems and developmental delays. (T-47). Religion is an integral part of the

Ranch program which is addressed to the child's entire needs—spiritual, physical and emotional. Although the VOA believes that the whole child must be helped, there is a Director of Religious Education on the Ranch staff who is responsible for coordinating the religious and spiritual activities of the children. (T-50).

One significant means by which the staff is included in the spiritual guidance of the children is through involvement in the Chapel Committee. The Chapel Committee is made up of the Religious Director, the child care staff and social workers. (*Id.*). However, the VOA believes that all staff members, whether or not they belong to the Church, are involved in the spiritual development of the child by serving the child's physical and emotional needs. Ranch employees are fully apprised of the religious nature of the VOA and the Ranch and told that they are expected to carry out the religious mission of the VOA during their employment at the Ranch. (T-51). An employee is evaluated on how well he or she carries out the religious mission of the VOA. (T-61 to 62). Indeed, it is hoped that after one year of service, the employee will become a member of the Church. The VOA's religious mission permeates every aspect of the Ranch program, including the hiring, evaluating and retaining of employees.

Although employees are not required to be Church members, they are expected to comply with the religious mandates of the VOA. Many employees do become Church members, but are not elevated to management status by virtue of becoming a Church member. Rather, Church members are placed in all levels of the organization for the purpose of best utilizing their skills.

To the layperson, unfamiliar with the philosophy and mission of the VOA, the services provided by Ranch employees appear to be secular activities of the Church. Nothing could be further from the truth. The employees of the Ranch, whether

or not they are Church members, are responsible for carrying out the Church's primary religious mission: helping people to find God through the good work and counseling received at the Ranch.

Procedure Below

On July 28, 1983, the Teamsters Local No. 638 ("the Union") filed a petition for certification of representation with the Board, seeking to represent "all full-time and regular part-time employees" at the Ranch, but excluding office clerical, guards and supervisors. A jurisdictional hearing was held on August 19, 1983, and on September 1, 1983, the Board issued its Decision and Direction of Election. The Board designated all full-time and regular part-time maintenance, laundry, housekeeping and childcare workers employed by the Ranch as the appropriate bargaining unit. The VOA-MN sought review of the Board's Decision, but review was denied. The Union received a majority of the votes cast in the representation election on September 29, 1983.

On December 5, 1983, a Complaint and Notice of Hearing were issued against VOA-MN-Bar None Boys Ranch, alleging, *inter alia,* that VOA-MN had failed and refused to bargain with the Union as the exclusive collective bargaining representative of unit employees. On or about April 28, 1984, the Board issued its Decision and Order, holding that VOA-MN had committed an unfair labor practice by its refusal to recognize and bargain with the Union. The Decision is reported at 269 NLRB No. 176 (App. 9-16).

VOA-MN sought review of the Board's Decision and Order pursuant to Sections 10(e) and (f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.,* in the United States Court of Appeals for the Eighth Circuit. The Board filed a Cross Application for Enforcement in the same

court. On January 15, 1985, the Court of Appeals affirmed the Board's Decision and granted enforcement of the Board's Order. (App. 1-8).

Throughout these proceedings, VOA-MN has maintained that Congress did not intend to bring the Church within the jurisdiction of the Board, but that if it did so intend, the exercise of jurisdiction will violate the Religion Clauses of the First Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

1. *The Court of Appeals' Decision is in Conflict with a Decision of this Court.*

This Court addressed a situation remarkably similar to the instant case in *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979). In that case, following Board certification of unions as the collective bargaining representatives for lay-teachers employed in Catholic high schools, the schools refused to recognize and bargain with the unions. As a consequence, the unions filed unfair labor practice charges with the Board. In the unfair labor practice proceedings on the technical refusal to bargain, the schools challenged the Board's exercise of jurisdiction over their operations on both statutory and constitutional grounds. The Board issued cease and desist orders against the schools and contended that it had jurisdiction when schools were "religiously associated" and not "completely religious." 224 NLRB 1221 (1976).

The United States Court of Appeals for the Seventh Circuit denied enforcement of the Board's orders, ruling that the Board's standard for exercising its discretion to extend its jurisdiction to religiously affiliated schools was not a workable guide and that the First Amendment's "free exercise" and "establishment" clauses prohibited the Board from exercising

jurisdiction. *Catholic Bishop of Chicago v. NLRB.* 559 F.2d 1112 (7th Cir. 1977).

This Court affirmed the Seventh Circuit Court of Appeals, holding that the absence of an "affirmative intention of the Congress clearly expressed" to bring teachers in church-operated schools within the jurisdiction of the Board would deny the Board such jurisdiction. 440 U.S. 506-07. The alternative to requiring the presence of an "affirmative intention by Congress clearly expressed" was "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

The Court determined that "difficult and sensitive questions" involving the Religion Clauses would arise if the Board asserted jurisdiction because of a "a significant risk that the First Amendment will be infringed" if the Board asserts jurisdiction over church-operated schools. *Id.* at 502. After noting the general potential for entanglement of government in religion when the government becomes involved in church-operated schools, the Court examined two specific ways in which the Board's jurisdiction would cause excessive entanglement in the affairs of the church. First, the resolution of many unfair labor practice charges would "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions." *Id.* (footnote omitted).

Second, the "Board will be called upon to decide what are 'terms and conditions of employment' and therefore mandatory subjects of bargaining. . . . Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions." *Id.* at 502-03. As a result of the nature of the

Board's control over the church-employer, this Court concluded: "We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow." *Id.* at 504.

Rather than rule that the National Labor Relations Act is unconstitutional as it applies to church-operated schools, this Court searched for a "clear expresion of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." *Id.* After closely examining the legislative history of the National Labor Relations Act, as amended in 1947 and 1974, the Court determined that no clear expression of an affirmative intention by Congress to bring church-operated schools within the jurisdiction of the Board could be found. *Id.* at 506-07. Thus, the church-operated schools had not violated the National Labor Relations Act by virtue of their refusal to bargain with the unions.

The Court of Appeals' decision in this action is in direct conflict with the Court's decision in *Catholic Bishop.* The Court of Appeals relied on its decision in *NLRB v. St. Louis Christian Home,* 663 F.2d 60 (8th Cir. 1981) (*Christian Home*), wherein it held that "a child care facility operated by the Christian Church, was essentially secular in operation and differed significantly from parochial schools." (App. at 5).

The court's effort to compare the Ranch with the Christian Church's child care facility and to distinguish the Ranch from a parochial school manifests a profound misunderstanding of the very essence of the VOA and its service activities. The degree of similarity between the Ranch and the parochial schools that were the subject of *Catholic Bishop* is striking. First, and most obviously, both the Ranch and the schools are operated by recognized churches. Second, the Ranch and the schools are means by which the respective churches are made known to others. This Petition already has explained the unique nature

of the VOA and its philosophy of bringing people in need closer to God by serving the whole person. The services provided to troubled youth at the Ranch are not ancillary to the VOA's primary religious activities; the services *are* the primary religious activities. Indeed, it can be said that services provided by the Ranch are more inextricably intertwined with the fundamental mission of the VOA than are the parochial schools with the Catholic Church. The services provided by the VOA to the needy, including troubled youth, are the exclusive means by which the VOA seeks to bring to people a knowledge of God. It also is the primary means by which the VOA recruits converts.

The third similarity between the Ranch and the parochial schools is that employees of both are engaged in the religious instruction of children. The record at the underlying jurisdictional hearing is replete with references to the duty of Ranch counselors to propagate the VOA religion to the children staying at the Ranch. (T-30, 31, 39, 50, 52 and 62). For example, when Reverend Dignum was examined at the hearing, the following exchange occurred:

> **Q.** Do the employees at Bar None engage in religious training?
>
> **A.** Yes, they do.
>
> **Q.** Do they participate in the religious mission of the VOA?
>
> **A.** Yes, we even have a person there who is in charge of religious activities.
>
> **Q.** That is a full-time staff person?
>
> **A.** Yes.

(T-39). Moreover, counselors at the Ranch are evaluated upon how well they fulfill this mission. (T-52, 62). Mr. Weight, the Program Director at the Ranch, testified that employees not

only are required to carry out the religious mission of the VOA and are evaluated on their performance of this duty, but there also is a separate segment of the job review that relates specifically to fulfillment of the VOA's mission. (T-62). Thus, the extent to which Ranch counselors are involved in religious instruction is two-fold: They actively propagate the religious values of the VOA, but more importantly, by serving the various needs of troubled youth, the VOA believes that those children will come to know God.

With all due respect, it is submitted that the services provided by the VOA, including services at the Ranch, are different in kind from the secular services provided by other religious denominations. For example, in *Christian Home,* the child care facility is not the primary religious activity of the Christian Church. Similarly, in *St. Elizabeth Community Hospital v. NLRB*, 626 F.2d 123 (9th Cir. 1980), another case relied upon by the Court of Appeals, the hospital was not the primary religious activity of the church which operated the hospital. In contrast, VOA's very reason for existence is to provide for the needs of the less fortunate in our society for the singular and express purpose of bringing those persons closer to God.

The language used by the Court of Appeals to distinguish the instant case from *Catholic Bishop* demonstrates the infirmities in the Court of Appeals' reasoning. The court argued that "the Ranch resembles a secular institution . . . its primary purpose [is] the care of children, not the propagation of faith. . . . The Ranch and its employees perform essentially secular functions." (App. at 6.) All of these arguments could be made with respect to parochial schools which "resemble" secular schools, their "primary purpose" is education and "employees perform essentially secular functions."

What particularly troubled the Court of Appeals was the fact that counselors did not "preach" a particular brand of religion nor try "to persuade children to accept VOA sectarian

doctrines." Moreover, religious services "are conducted at the Ranch by ministers of various denominations from the community." (App. at 6). The Court of Appeals is correct in describing the Ranch, but wholly misunderstands the VOA's religious principles. The VOA does not preach the tenets of any particular religious denomination; rather, the Church serves the most fundamental needs of the unfortunates in our society so that those persons will gain a closer knowledge and personal understanding of God. The VOA is not concerned with the particular "brand" of religion which each person chooses to follow. Put more simply, the Ranch's primary purpose is to permit the children to gain the knowledge of God and the means for accomplishing this purpose is to help the children to overcome their social, emotional and behavioral difficulties. Indeed, it may be inappropriate to speak of "purposes" and "means" because the two virtually are inseparable.

The fact that there are secular analogs to the religious activities of the VOA does not diminish the totally religious character of those activities. Furthermore, the existence of secular analogs does not empower the Court of Appeals to question the validity of the VOA's religious beliefs. When an organization establishes itself as a *bona fide* religious organization, its beliefs are beyond dispute by the government.

The distinctions which the Court of Appeals has drawn between this case and *Catholic Bishop* represent the proverbial distinction without a difference. The Court of Appeals has limited the holding of *Catholic Bishop* to the facts of that case; yet, there is nothing in this Court's opinion in *Catholic Bishop* to suggest that church-operated schools are the only church-operated activities not within the jurisdiction of the Board.

2. *Board Jurisdiction over the Ranch would Significantly Entangle the Government in Religious Affairs and Infringe the Freedom of Religion.*

The debate over the similarities and dissimilarities between this action and *Catholic Bishop* is secondary to the more important issue of the effect of the Board's jurisdiction over the Ranch. The First Amendment erected a wall that separates church and state in matters of religion. This Court has said of the wall: "We could not approve the slightest breach." *Everson v. Board of Education,* 330 U.S. 1, 18 (1946). The only justification for becoming entangled in or infringing religion occurs when "the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert v. Verner,* 374 U.S. 398, 406 (1963). It is inevitable that conflict will flow from the Board's intervention in the affairs of the Church. Under the First Amendment, the nature of religious beliefs virtually is beyond question by government officials. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). As the late Justice Douglas explained in *United States v. Ballard,* 322 U.S. 78, 86-7 (1944): "Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."

The VOA's religious beliefs and goals have been held for over eight decades. These beliefs are not mere "shams and absurdities," unentitled to the protection of the First Amendment; they are deeply rooted in the time-honored Christian principles of caring for and counseling those less fortunate than one's self. Yet, these administrative and judicial proceedings have caused the VOA to be put to the proof of its religious beliefs. At the underlying jurisdictional hearing, numerous witnesses were called on behalf of the Church to *explain* their religion and to *justify* their belief that the provision of social services is, for the VOA, a primary religious activity and not something that merely is ancillary to the Church's primary

mission. More startling is the refusal of the Court of Appeals to acknowledge the essential religious character of the services provided by the Ranch. The Court's assertion that the services "resemble" secular activities is the same position taken by the Board in *Catholic Bishop* where it argued that parochial schools were not "completely religious," but only were "religiously associated." 440 U.S. 490, 494 n. 7. However, it should not be the province of the Court of Appeals or the Board to determine just how religious the VOA's activities are. It becomes apparent that the Court of Appeals was unable to accept the VOA's religious beliefs by recharacterizing the Church's primary mission as "essentially secular."

There are, however, other significant ways in which entanglement and infringement will follow the Board's intervention into the affairs of the Ranch. First, the Board will be called upon to resolve charges of unfair labor practice which may be brought against the VOA. Yet, because the entire management of the Ranch is vested in the officers of the VOA, all of whom are licensed or ordained ministers, "the resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the [Ranch's] religious mission." *Catholic Bishop,* 440 U.S. at 502. Although many staff members at the Ranch are not VOA members, they are expected to assist in fulfilling the Church's mission and are required to abide by the tenets of the Church. Moreover, the VOA considers that the staff is the primary source for new recruits following a mandatory year of service. The very process by which the Board would investigate an unfair labor practice charge significantly risks entanglement into the affairs of the Church and infringement of VOA members' freedom to exercise their religion. *See Catholic Bishop,* 440 U.S. at 502.

The second serious point at which government will be entangled in religious affairs and risk infringing freedom of religion is the employer's statutory duty to bargain over terms and conditions of employment. *See* 29 U.S.C. § 158(d). Virtually everything that occurs at the Ranch affects the staff and could be considered a "condition of employment." For example, the VOA requires that the staff abide by the tenets of the Church, yet if the Union is successful in bargaining for a "just cause" dismissal standard, a court or the Board could be called upon to determine whether dismissal for breach of the Church's religious tenets constitutes just cause. Likewise, the Union could bargain for release from Chapel Committee activities, and if the VOA refused to bargain on this issue, the Board would be called upon to determine whether participation in such activities was a "condition of employment."

Board jurisdiction over the Ranch inevitably will lead to conflicts between the government and the Church, resulting in a substantial risk of governmental entanglement in the affairs of the Church and infringement of the Church's religious beliefs. This risk is more real than in *Catholic Bishop* because the VOA is engaged in its primary religious activities at the Ranch.

3. *There is No Clear Expression of an Affirmative Intention of Congress that Staff at the Ranch Should be Covered by the National Labor Relations Act.*

Because Board jurisdiction over the Ranch would raise serious constitutional issues, an express intention by Congress to extend the Board's jurisdiction over the Ranch must be found before determining that such jurisdiction exists. A review of the legislative history of the National Labor Relations Act of 1935 ("NLRA" or "the Act") demonstrates no clear expression of an affirmative intention by Congress that laypersons involved in the primary religious activities of a church should be covered by the Act. When Congress enacted the NLRA, its principal

concern was with counterbalancing the collective rights of employers which had been authorized by the National Industrial Recovery Act. *See Catholic Bishop*, 440 U.S. at 505. Thus, congressional attention was focused on employment in the private sector.

Although the definition of "employer" in the NLRA was modified by passage of the Labor Management Relations Act of 1947 (Taft-Hartley) and more recently by Public Law 93-360, 88 Stat. 395, nothing in the legislative histories of those laws indicates that Congress intended to extend Board jurisdiction over a church-operated residential treatment center for troubled youth. *See* HR 3020, 80th Cong., 1st Sess. (1947); 1 National Labor Relations Board, *Legislative History of the Labor Management Relations Act*, 1947, p. 34 (1948); HR Rep. No. 245, 80th Cong., 1st Sess., 12 (1947); *Legislative History of the Coverage of Non-profit Hospitals under the National Labor Relations Act*, 1974, 93d Cong., 2d Sess., 118, 331-32 (1974). At present, the NLRA defines an employer as:

> . . . any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 152(2). One need only look to Congress' "[f]indings and declaration of policy" to discern that it did not contemplate coverage of a church-operated residential treatment center—especially when that treatment center is part of the church's primary religious activities. *See id.* § 151.

CONCLUSION

The absence of an affirmative intention of Congress, clearly expressed, justifies the conclusion that Congress did not contemplate that the Board would require a church-operated

residential treatment center engaged in the primary religious activities of the church to grant recognition to a union as the bargaining agent for the center's staff. A contrary finding would necessarily lead to holding that the NLRA is unconstitutional as it applies to the Church. The Court of Appeals' decision in this matter is contrary to the decision of this Court and, therefore, should be reversed.

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the decision of the United States Court of Appeals for the Eighth Circuit in *VOA-Minnesota—Bar None Boys Ranch v. NLRB*. In the event that the Petition is granted, Petitioner prays that the decision of the court below be reversed.

April 12, 1985

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 84-1536

Volunteers of America—
Minnesota-Bar None Boys Ranch,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Petition for Review of Order of the National Labor Relations Board

Submitted: November 16, 1984
Filed: January 15, 1985

Before BRIGHT, MCMILLIAN and BOWMAN, Circuit Judges.

MCMILLIAN, Circuit Judge.

The Volunteers of America-Minnesota (VOA-Minnesota) seeks review of an order of the National Labor Relations Board (NLRB) requiring the VOA-Minnesota Bar None Boys Ranch (the Ranch) to bargain with the union representing the employees of the Ranch. The NLRB has cross-applied for enforcement of its order. For denial of enforcement, the VOA-Minnesota argues that (1) the NLRB improperly exercised jurisdiction over the Ranch and (2) the exercise of jurisdiction infringed the "free exercise" and "establishment" clauses of the first amendment. For the reasons discussed below, we affirm the decision of the NLRB and grant enforcement of the NLRB's order.

The Ranch is a religiously-affiliated residential treatment center for children that is operated by the VOA-Minnesota, an unincorporated association that operates under the direction of the National Society of the VOA. The VOA is a religious movement that started in New York City in 1896. The VOA-Minnesota Post was also established is 1896. The VOA-Minnesota Post and the National Society are recognized as religious orders. The VOA is recognized as a church by the Internal Revenue Service and by the Commerce Department. The state of Minnesota has also granted the VOA an exemption as a non-profit organization and has recognized the VOA as a church. The VOA does not pay federal income tax, federal F.I.C.A. tax, state tax, sales tax, or property tax. All of the officers of the National Society of VOA are either ordained or licensed ministers.

The VOA is divided into four regions nationally and the regions are divided into state organizations called posts. The posts, directed by ordained ministers, in turn are responsible for the VOA programs operated in the post. The Ranch is in the Minnesota Post, which is directed by Reverend James Hogie.

The VOA's basic religious philosophy is set out in ten "cardinal doctrines" in Article XI of the VOA's constitution. The VOA does not solicit new members to the VOA. Rather, the VOA is committed to assisting persons to return to and to actively practice the faith of their choice. The VOA is offered as a church only to those who have not already chosen a religious faith. Although the VOA does not attempt to proselytize new members, it does seek to bring people to a knowledge of God by providing humanitarian services to those in need. One such program for doing this is the Ranch.

The Ranch is a coeducational residential treatment facility in Anoka, Minnesota, for children with emotional, neurological and developmental problems. The director of the Ranch, Verlyn Wenndt, has responsibility for all services provided by

the Ranch and reports to Reverend James Hogie. The Ranch's program director, Larry Weight, has responsibility for the Ranch's internal operations. Neither is an ordained minister nor does the record indicate that any VOA ministers work at the Ranch. The director of religious education is responsible for coordinating the religious and spiritual activities of the children. A chapel committee, made up of the director of religious education, the child care staff and social workers, also takes part in planning the spiritual and religious aspects of the program at the Ranch.

On July 28, 1983, Teamsters Local No. 683 filed with the NLRB's regional office in Minneapolis, Minnesota, a petition for a representation election among the Ranch's maintenance, laundry, housekeeping and child care workers. A hearing officer from the NLRB regional office conducted a non-adversary hearing on issues raised by the petition. The Ranch contended at the hearing that the Ranch operates as a part of the VOA and that the NLRB's assertion of jurisdiction is impermissible under the National Labor Relations Act (the Act), as amended, 29 U.S.C. § 151 *et seq.* (1982), and the religion clauses of the first amendment because of the risk of excessive governmental entanglement with religion.

On September 1, 1983, the acting regional director of the NLRB directed that an election be held and found that the Ranch's facility

> provides an essentially secular charitable service in a sectarian manner; that eligibility to participate as a resident of [the facility] is determined without regard to religious affiliation; that the employees . . . are hired without regard to religious affiliation; that the employees . . . are not required to join the national [religious] organization; [and] that the duties of these employees do not include the propagation of the national organization's substantive religious convictions.

On September 28, 1983, the NLRB denied the Ranch's request for review. On September 29, 1983, a representation election was held and the union won by a vote of 33 to 6. Subsequently, the NLRB's acting regional director certified the union as the collective bargaining representative of the Ranch's maintenance, laundry, housekeeping, and child care workers.

After the Ranch refused the union's oral request to begin collective bargaining, the union filed an unfair labor practice charge alleging that the Ranch's refusal to bargain was unlawful. A complaint was issued on the charge alleging that the Ranch's refusal to bargain with the union violated § 158(a)(5) of the Act. The Ranch admitted its refusal to bargain but asserted that the refusal was not unlawful because the NLRB's exercise of jurisdiction over it was improper. On April 17, 1984, the NLRB granted the union's motion for summary judgment, found the Ranch's refusal to bargain unlawful and issued a bargaining order.

On appeal VOA-Minnesota argues that the exercise of jurisdiction by the Board poses a significant risk of entanglement with the VOA's religious tenets and, therefore, jurisdiction may not be exercised because there has been no affirmative expression by Congress that the NLRB should exercise jurisdiction over religious institutions such as the Ranch. Further, the VOA argues that the exercise of jurisdiction, even if properly asserted by the NLRB, violates the "establishment" and "free exercise" clauses of the first amendment.

Congress intended to grant the NLRB the broadest possible jurisdiction permitted by the Constitution. *NLRB v. St. Louis Christian Home,* 663 F.2d 60, 62 (8th Cir. 1981) (*Christian Home*). The Board may exercise jurisdiction over all employers except those expressly excluded by the Act, *e.g.*, the United States, states or political subdivisions, 29 U.S.C. § 152(2), or those excluded under the Board's discretionary jurisdictional standards expressed as a minimum level of gross

annual revenues. *Id.* § 164(c)(1). The Ranch admits that it comes within the statutory definition of "employer" and is engaged in interstate commerce.

The VOA-Minnesota bases its claim for exclusion on *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979) (*Catholic Bishop*), wherein the Supreme Court held that the NLRB had improperly exercised jurisdiction over Catholic parochial schools operated by the Catholic Bishop of Chicago. The VOA emphasizes the similarity between the Chicago parochial schools and the Ranch: (1) both are operated by recognized churches, (2) both are means by which the religion of the church is made known to others, and (3) the employees of the Ranch and the Chicago parochial schools are involved in the religious instruction of children.

These arguments are without merit. Similar arguments were rejected in *Christian Home,* 663 F.2d 60, and *Denver Post v. NLRB,* 732 F.2d 769 (10th Cir. 1984) (NLRB properly exercised jurisdiction over VOA residential and out-patient social services programs). This court held in *Christian Home* that "church operation, although important, constituted but one of many features which considered together" would indicate potential first amendment problems. 663 F.2d at 63. We held that the Christian Home, a child care facility operated by the Christian Church, was essentially secular in operation and differed significantly from parochial schools. Notably, the Christian Home received funds primarily from government sources, admitted children and hired staff without regard to religion, and only provided Christian Church services with the consent of the parents. *Id.* at 64.

The evidence demonstrates that the Ranch, like the Christian Home, differs from a parochial school. Although the VOA may view the Ranch as a vehicle for its religious missionary activities, the Ranch resembles a secular institution in critical aspects. The Ranch has as its primary purpose the care of

children, not the propagation of faith. The Ranch is operated by the VOA-Minnesota, a church, but there are no ministers on staff at the Ranch. The lay staff is chosen without regard to religious beliefs or affiliations and does not propagate the tenets of the VOA. The staff does not conduct religious classes or services and does not attempt to persuade children to accept VOA sectarian doctrines. Religious services are conducted at the Ranch by ministers of various denominations from the community.

The Ranch and its employees perform essentially secular functions. This is in contrast to the parochial schools in *Catholic Bishop* where the religious character of the schools existed at all three levels: the church had a religious purpose in establishing the schools, the schools had a religious purpose, and the teachers were mandated to propagate sectarian doctrines. As we said in *Christian Home,* "[i]t is the commitment of the faculty to religious values ... and the obligation to propagate those values which provide the risk of entanglement." This purpose and function is absent in the Ranch. 663 F.2d at 64 n.5, *citing NLRB v. Bishop Ford Central Catholic High School,* 623 F.2d 818, 822 (2d Cir. 1980), *cert. denied,* 450 U.S. 996 (1981).

The VOA-Minnesota argues that its religious commitment to serve as many children as possible will bring it into conflict with the union, which wants to enhance the economic well-being of its members.[1] Further, the VOA envisions the NLRB intervening where a staff person has been disciplined for not carrying out a duty related to the VOA religious tenets. We do not believe that the VOA-Minnesota has demonstrated that such is likely to occur or that their sectarian objectives for the Ranch will be impaired. Inquiry by the NLRB need not intrude on any activity substantially religious in character. The VOA-Minnesota's speculation that sectarian objectives will be impaired is insufficient to deprive the NLRB of jurisdiction. *St. Elizabeth Community Hospital v. NLRB*, 626 F.2d 123, 129 (9th Cir. 1980).

The NLRB's assertion of jurisdiction over the Ranch does not pose a significant risk of entanglement and does not violate the free exercise clause or the establishment clause of the first amendment. We therefore need not decide whether Congress

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[1] The VOA-Minnesota in oral argument cited as supportive of its position this court's characterization of the collective bargaining process as "confrontational and adversarial." *Donovan v. Tony & Susan Alamo Foundation*, 722 F.2d 397, 403 (8th Cir. 1983) *(Alamo), cert. granted*, 53 U.S.L.W. 3285 (U.S. Oct. 16, 1984) (No. 83-1935). The VOA argues that confrontation between VOA and the union and the subsequent intervention by the Board will inevitably result in the Board becoming excessively entangled with VOA religious tenets.

Alamo involved the applicability of the Fair Labor Standards Act (FLSA) to persons who received lodging, food, transportation, and medical care in exchange for working in thirty commercial businesses operated by a religious foundation engaged in evangelism. Collective bargaining was described in *Alamo* as confrontational and adversarial only to demonstrate that the application of the FLSA to a religious organization did not present the same risk of entanglement as was present in the collective bargaining in *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). We did not hold that the confrontational quality of collective bargaining deprives the NLRB of jurisdiction over religiously-affiliated organizations. Each case must be examined to determine if there is excessive entanglement.

expressed an "affirmative intention" to confer jurisdiction. Accordingly, we enforce the NLRB's order requiring the Ranch to bargain collectively with the union.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

ZHDe

269 NLRB No. 176

D—1383
Anoka, MN

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOLUNTEERS OF AMERICA—MINNESOTA-BAR NONE BOYS RANCH

and Case 18—CA—8542

TEAMSTERS LOCAL NO. 638, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge filed by the Union 1 December 1983, the General Counsel of the National Labor Relations Board issued a complaint 5 December 1983 against the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 6 October 1983, following a Board election in Case 18—RC—13483, the Union was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed. Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB No. 46 (Nov. 9, 1982).) The complaint further alleges that since 20 October

1983 the Respondent has refused to bargain with the Union. On 15 December 1983 the Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On 11 January 1984 the General Counsel filed a Motion for Summary Judgment. On 19 January 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its response to the Motion for Summary Judgment, the Respondent argues that the National Labor Relations Board does not have jurisdiction over it because the Volunteers of America is a religious church engaged primarily in a religious mission. In his Decision and Direction of Election, issued 1 September 1983, in the representation proceeding,[1] the Acting Regional Director for Region 18 concluded that jurisdiction should be asserted over the Respondent. He determined that the Respondent is an unincorporated nonprofit unit of the National Society of Volunteers of America (the National Society). He further determined that the Respondent provides an essentially secular charitable service in a nonsectarian manner; that patient eligibility and employee hiring for the Respondent are without regard to religious affiliation; that the employees in the petitioned-for unit are not required to join the National Society; and that their duties do not include propagation of the National Society's substantive religious convictions. By telegram dated 28 September 1983, the Board denied Respondent's Request for Review.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section

[1] The hearing in the representation case was held 19 August 1983.

8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce any newly discovered and previously unavailable evidence. Nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, an unincorporated nonprofit unit of the National Society of Volunteers of America, which is an incorporated, nonprofit, religious. and charitable organization, operates a coeducational residential treatment facility for children and adolescents with emotional, neurological, and developmental difficulties at its facility in Anoka, Minnesota. During the 12-month period ending 30 June 1983, the Respondent derived gross revenues in excess of $500,000, of which approximately $100,000 came directly from sources outside the State of Minnesota. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held 29 September 1983 the Union

was certified 6 October 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance, laundry, housekeeping and childcare workers employed by the Employer at its facility located at 22426 St. Francis Boulevard, Anoka, Minnesota; excluding office clerical employees, professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 19 October 1983 the Union has requested the Respondent to bargain, and since 20 October 1983 the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

By refusing on and after 20 October 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(e)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785

(1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Volunteers of America—Minnesota-Bar None Boys Ranch, Anoka, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Teamsters Local No. 638, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement;

> All full-time and regular part-time maintenance, laundry, housekeeping and childcare workers employed by the Employer at its facility located at 22426 St. Francis Boulevard, Anoka, Minnesota; excluding office clerical employees, professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

(b) Post at its facility in Anoka, Minnesota, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.

17 April 1984

Don A. Zimmerman, Member

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Teamsters Local No. 638, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time maintenance, laundry, housekeeping and childcare workers employed by the Employer at its facility located at 22426 St. Francis Boulevard, Anoka, Minnesota; excluding office clerical employees, professional employees, managerial employees, confidential employees, and guards and supervisors as defined in the Act.

VOLUNTEERS OF AMERICA—MINNESOTA-
BAR NONE BOYS RANCH

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 316, 110 South Fourth Street, Minneapolis, Minnesota 55401, Telephone 612-725-2615.